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No. 894

In the Supreme Court of the United States

OCTOBER TERM, 1960

FRANO BATISTIC, PETITIONER

v.

ALVIN L. PILLIOD, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulation involved	2
Statement	3
Argument	5
Conclusion	6
Cases:	
Cantisani, United States ex rel. v. *Holton*, 248 F. 2d 737, certiorari denied, 356 U.S. 932	6
Chao-Ling Wang v. *Pilliod*, 285 F. 2d 517	5
Dolenz, United States ex rel. v. *Shaughnessy*, 200 F. 2d 288, certiorari denied, 345 U.S. 928	6
Obrenovic v. *Pilliod*, 282 F. 2d 874	5
Sunjka v. *Esperdy*, 182 F. Supp. 599, affirmed, April 13, 1960 (C.A. 2), certiorari denied *sub nom. Roncevich* v. *Esperdy*, 364 U.S. 815	6
Statute and regulation:	
Immigration and Nationality Act of 1952, § 243, 66 Stat. 214, 8 U.S.C. 1253	2, 4, 5
8 C.F.R. 243.3	2, 4

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–3a) is reported at 286 F. 2d 268. The opinion of the district court (App. 27–33) [1] is reported at 188 F. Supp. 344.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1961 (Pet. App. 1a). A petition for rehearing *en banc* was denied on February 10, 1961 (Pet. App. 4a). The petition for a writ of certiorari was filed on April 13, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "App." refers to the Appendix in the petitioner's brief in the court of appeals.

QUESTION PRESENTED

Whether the Attorney General, through delegated representatives, properly refused to withhold the deportation to Yugoslavia of the alien petitioner, who claimed that he would be subject to physical persecution if deported there.

STATUTE AND REGULATION INVOLVED

Section 243(h) of the Immigration and Nationality Act of 1952, 66 Stat. 214, 8 U.S.C. 1253, provides:

* * * * *

(h) *Withholding of deportation.*

The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.

8 C.F.R. 243.3 provides:

* * * * *

(b) *Stay of deportation.*

* * * * *

(2) If the request for a stay of deportation is predicated upon a claim by the alien that he would be subject to physical persecution if deported to the country designated by the Service, he shall be requested, upon notice, to appear before a special inquiry officer for interrogation under oath. The alien may have present with him, at his own expense, during the interrogation any attorney or representative authorized to practice before the Service. The alien may submit any evidence in support of his claim which he believes should be con-

sidered by the special inquiry officer. Upon completion of the interrogation, the special inquiry officer shall prepare a written memorandum of his findings and a recommendation which shall be forwarded to the regional commissioner together with all the evidence and information submitted by the alien or which may be applicable to the case. The alien shall be served with a copy of the special inquiry officer's memorandum and recommendation and shall be allowed five days from date of service within which to submit written representations to the regional commissioner. If the alien refuses to appear for interrogation before a special inquiry officer when requested to do so or waives his appearance, all the pertinent evidence and available information in the case shall immediately be submitted to the regional commissioner. The decision whether to withhold deportation and, if so, for what period of time shall be finally made by the regional commissioner upon consideration of all the evidence submitted by the alien and any other pertinent evidence or available information.

* * * * *

STATEMENT

Petitioner is a 19-year-old single male alien, a native and citizen of Yugoslavia, who entered the United States on April 14, 1958 as a visitor. On January 26, 1959, he was ordered deported to Yugoslavia under Section 241(a)(2) of the Immigration and Nationality Act on the ground that after admission as a nonimmigrant visitor he had remained longer than per-

mitted (App. 17). His deportability is not contested (App. 28).

On January 29, 1959, petitioner applied for a stay of deportation under Section 243(h) of the Act (*supra*, p. 2) (App. 17). Appearing with counsel (App. 16) before a special inquiry officer (see 8 C.F.R. 243.3(b)(2), *supra*, pp. 2–3), petitioner testified that he attended the Catholic Church every week while in Yugoslavia; that he was not punished for his church attendance; that he did not engage in any anti-Communist activities; and that he was never physically persecuted in Yugoslavia. The special inquiry officer held that petitioner's claim that he would be persecuted because of his religious beliefs could not be substantiated (App. 19). Petitioner also testified that he and his family were anti-Communists (App. 18) and that, if deported, he would be put in the army and sent to the worst places in Yugoslavia (App. 20, 21). One witness testified about his own hardships in the Yugoslav army as a result of his membership in an anti-Communist student group (App. 18, 22–25). Another witness, who fled Yugoslavia in 1953, testified that in his opinion petitioner would be imprisoned as one caught trying to escape (App. 18–19). The special inquiry officer concluded that petitioner had not shown danger of persecution for religious beliefs, and that the possibility of being taken into the army did not constitute physical persecution under Section 243(h). On March 31, 1959, he recommended that the application to withhold deportation be denied (App. 19–20, 7).

The Regional Commissioner on April 21, 1959, ruled that after "examination of the entire record and other available information, it is concluded that the applicant will not be physically persecuted if deported to Yugoslavia at this time" (App. 14–16).

On May 6, 1959, petitioner filed in the United States District Court for the Northern District of Illinois a complaint for a declaratory judgment under the Administrative Procedure Act, in which he attacked the denial of his application as arbitrary and capricious (App. 6–9). The district court granted respondent's motion for summary judgment, observing that petitioner had been accorded procedural due process and that the discretion vested in the Attorney General by Section 243(h) was not subject to judicial review. The court of appeals affirmed (Pet. App. 3a).

ARGUMENT

The administrative authorities could reasonably conclude that petitioner had not made a sufficient showing that he would be subject to persecution if sent to Yugoslavia. Taking petitioner's evidence in the light most favorable to him, it showed no more than that he feared his army service would be more arduous than would be the service of others. This testimony, speculative at best, does not show the type of physical persecution to which Section 243(h) was directed. Accordingly, the courts below properly held that they had no power to substitute their opinion for that of the Attorney General. *Chao-Ling Wang* v. *Pilliod*, 285 F. 2d 517, 519–520 (C.A. 7); *Obrenovic* v. *Pilliod*, 282 F. 2d 874, 876 (C.A. 7); *United States ex*

rel. Cantisani v. *Holton*, 248 F. 2d 737, 738–739 (C.A. 7), certiorari denied, 356 U.S. 932; *United States ex rel. Dolenz* v. *Shaughnessy*, 200 F. 2d 288, 291 (C.A. 2), certiorari denied, 345 U.S. 928; *Sunjka* v. *Esperdy*, 182 F. Supp. 599, 601 (S.D. N.Y.), affirmed, April 13, 1960 (C.A. 2), certiorari denied *sub nom. Roncevich* v. *Esperdy*, 364 U.S. 815.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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